

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Early
Termination of Probation By:

Marcos Palafox, Jr., M.D.

Physician's and Surgeon's
Certificate No. A 80142

Case No. 800-2019-062855

Respondent.

DECISION

The attached Proposed Decision is hereby amended, pursuant to Government Code section 11517(c)(2)(C), to correct a clerical error that does not affect the factual or legal basis of the Proposed Decision. The Proposed Decision is amended as follows:

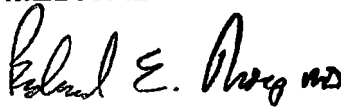
1. The name shown throughout the document is corrected to read "Marcos Palafox, Jr., M.D."
2. Page 2, Paragraph 1, Line 4: the license expiration date is corrected to read "October 31, 2023."

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on November 4, 2021.

IT IS SO ORDERED October 5, 2021.

MEDICAL BOARD OF CALIFORNIA



Richard E. Thorp, M.D., Chair
Panel B

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

**In the Matter of the Petition for Early Termination of
Probation By:**

MARCOS PALAFOX, M.D., Petitioner

Agency Case No. 800-2019-062855

OAH No. 2021040388

PROPOSED DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on July 29, 2021, by video conference.

Petitioner Marcos Palafox, M.D., appeared and was represented by Lindsay M. Johnson, Ray & Bishop, PLC.

Brenda P. Reyes, Deputy Attorney General, appeared on behalf of the People of the State of California pursuant to Government Code section 11522.

During the hearing, the People requested that exhibits 5, 6, & 7 be sealed to protect private information, and a separate protective order shall issue, sealing those

exhibits. During the hearing and decision process some other private information, such as Petitioner's drivers' license number was found, and redacted.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on July 29, 2021.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Petitioner was licensed by the Medical Board of California (Board) as a physician and surgeon on August 9, 2002. He holds Physician's and Surgeon's Certificate number A 80142, and he practices emergency medicine. The license is due to expire on October 31, 2021.

2. On March 9, 2017, the Board issued a Decision and Order that revoked Petitioner's Certificate, but that order was stayed and Petitioner's Certificate was placed on probation for seven years from the effective date of the order, April 7, 2017. The Decision and Order (hereafter probation order) issued in the Board's case number 800-2015-013366.

3. The probation order was based upon a stipulation entered into between Petitioner and Kimberly Kirchmeyer, then the Executive Officer of the Board. The stipulation resolved an accusation filed against Petitioner on April 19, 2016.

4. Petitioner submitted his Petition for Penalty Relief (Petition) to the Board in November or December 2019, the date of receipt by the Board not being clear from the record. All jurisdictional requirements have been met.

The Underlying Cause for Discipline

5. (A) Petitioner's license was disciplined primarily because he was convicted of driving with a blood alcohol of content of 0.17 percent after a jury trial. His conviction was entered in the Superior Court of California, County of Riverside on April 10, 2015, as a misdemeanor. Petitioner had a prior conviction for driving under the influence in May 2004.

(B) A further ground for discipline was alleged against Petitioner, asserting that he had engaged in dishonest acts, because Petitioner had given contradictory statements and testimony about the facts and circumstances of the events that resulted in his 2015 criminal conviction.

(C) The facts underlying the 2015 conviction are that on February 10, 2013, Petitioner drove after he had consumed whiskey, and he lost control of his car, striking a roadway sign, then driving back onto the roadway, thereafter hitting the curb, a tree, and a wall. His car caught on fire, and he was extracted from it while unconscious.

(D) The court placed Petitioner on four years' probation, on the condition he serve 45 days in jail, but on work release. Various probation terms were imposed, including payment of fines, penalties, and fees of approximately \$2,100, and participation in alcohol education courses. Other terms, typical to probation grants in such cases, were imposed.

6. Petitioner completed his court-ordered probation in a timely manner. There is no evidence of any violations of probation.

A Summary of Petitioner's License Probation Terms

7. In his stipulation with the Board, Petitioner agreed to the imposition of probation terms common in cases of this type. The probation terms were in the Board's standard language, and the terms are not repeated in their entirety here, to avoid a prolix decision. In summary, the probation order required the following:

Term No. 1: Petitioner was required to completely abstain from the use or possession of controlled substances, unless lawfully prescribed by another practitioner for a bona fide illness or condition. If he was prescribed such drugs by another practitioner, he was obligated to notify the Board within 15 days of the prescription, providing the practitioner's name and address, the type and quantity of the medication, and the identity of the issuing pharmacy. This probation term went on to provide that if Petitioner had a positive drug test, he had to immediately cease practice.

Term No. 2: Petitioner was required to completely abstain from alcohol use. As with Term No. 1, a positive test showing alcohol use would lead to a notice to cease practicing.

Term No. 3: Petitioner was required to take an ethics course.

Term No. 4: Petitioner was required to undergo a psychiatric evaluation by a Board-appointed professional.

Term No. 5: Petitioner was required to undergo psychotherapy with a Board-approved professional.

Term No. 6: Petitioner was required to undergo a medical exam and to have medical treatment as deemed necessary.

Term No. 7: Petitioner was required to provide the Board with the identity and contact information for all employers and supervisors.

Term No. 8: Petitioner was obligated to submit to random biological fluid testing at his expense, at a firm approved by the Board. Failure to cooperate in drug testing would lead to immediate cessation of practice.

Term No. 9: Petitioner was required to participate in substance abuse group support meetings, at least once per week. Petitioner was obligated to obtain the Board's approval of the group, and certain other requirements were imposed, including as to the qualifications of the group facilitator.

Term No. 10: Petitioner was required to obtain a worksite monitor.

Term No. 11: Petitioner was not to engage in solo medical practice.

Term No. 12: Within one week of the effective date of the Decision, Petitioner was required to disclose the Decision to the Chief of Staff or Chief Executive at any hospital where he had privileges. Petitioner was required to give such notice to his malpractice insurance carrier.

Term No. 13: Petitioner was barred from supervising physician assistants.

Term No. 14: Petitioner was obligated to obey all laws.

Term No. 15: Petitioner was required to make quarterly reports to the Board.

Term No. 16: Term number 16 set forth a number of general probation requirements, such as keeping the Board apprised of Petitioner's address and place of practice, and to promptly renew his license. Further, he was required to notify the

Board if he was going to leave California for more than 30 days, or if he was going to move from California, or practice in another state.

Term No. 17: Petitioner was obligated to submit to in-person interviews upon request by the Board.

Term No. 18: This term set out rules for the situation where Petitioner might stop practicing in California for more than 30 days.

Term No. 19: This term provided that upon completion of probation Petitioner's certificate would be fully restored.

Term No. 20: This term provided what the effect of probation violations would be.

Term No. 21: This term provided for the eventuality where Petitioner might surrender his license.

Term No. 22: Required Petitioner to pay probation monitoring costs.

Petitioner's Rehabilitation

PETITIONER'S BACKGROUND

8. Petitioner completed his undergraduate education at the University of California, at Riverside (UCR) in 1996, and he received his medical degree from the UCLA School of Medicine in 2001. He was a resident at Martin Luther King-Drew Medical Center from 2001 through 2004, and during his last year he was chief resident in the emergency medicine department. He has been board-certified in Emergency Medicine since 2005, and is certified through 2025. Petitioner has worked in various hospitals in southern California since completing his residency.

9. Petitioner described his history of alcohol use to Nathan E. Lavid, M.D., who conducted the Board-ordered psychiatric examination of Petitioner. (Probation term 4.) Petitioner did not drink during high school or college, but began drinking socially in the early 2000's. When he was arrested for his first DUI, he stopped drinking for about one year, but began again, and he admitted to Dr. Lavid that he had been abusing alcohol. He generally drank on his off days, typically until inebriated.

10. Petitioner separated from and then divorced his first wife between 2005 and 2006. He re-married in 2006 and started a family. His oldest child was born in February 2007, and his oldest boy was born in August 2008.

11. Petitioner was grappling with anxiety and depression, and he sought psychiatric care in approximately 2009 or 2010. The care he sought led to prescriptions of drugs such as Zoloft or Adderall. Dr. Lavid suggested psychotherapy as an alternative to prescription drugs, and Petitioner sought such assistance, which also complied with term 5 of his probation. He began treating with Ronald Offenstein, Ph.D.

12. Petitioner was severely injured in the accident that led to his second DUI conviction. Petitioner claims the accident date (February 10, 2013) as his sobriety date. He had 17 bones broken in the accident, including his jaw and leg, and he suffered a severe concussion. He spent over one week in the hospital following the accident.

13. Petitioner works the overnight shifts in the emergency room at Parkview Community Hospital Medical Center (Parkview). He is able to work that shift without supervising physician's assistants, because another doctor works with him, and supervises the assistants until they leave (the assistants do not work the entire

overnight shift). Petitioner disclosed his discipline and probation status to his supervisors, one of whom acts as his practice monitor.

TREATMENT FOR ALCOHOLISM

14. (A) As noted above, Petitioner completed his criminal probation, which required alcohol education programs. One of those was an 18-month program. After Petitioner made his stipulated settlement with the Board, he began participating in a support group, Phoenix Rising Behavioral Health Care Group (Phoenix). Petitioner testified that the Phoenix program follows a 12-step program, but is not a pure Alcoholics Anonymous program. He does not have a sponsor, but his counselor fills that roll. Petitioner's faith is a substitute for the higher power concept found in traditional 12-step programs.

(B) The clinical director of Phoenix, Dr. Alia Harlan Kanealakala wrote a letter on Petitioner's behalf, dated October 28, 2019. She wrote that Petitioner had been consistent with his attendance in the substance abuse treatment groups conducted at Phoenix, and she described his attendance as willing.

(C) Dr. Kanealakala wrote that Petitioner has shown strong levels of accountability and he seeks to work on his personal development. She further noted that he had demonstrated high levels of insight when he first began with the program, which insight had increased due to his efforts. She further described how he is an asset in the group meetings, open in communication and an asset to new members of the group.

(D) Petitioner has been participating in group meetings via Zoom during the pandemic. If his probation is terminated, Petitioner intends to continue

participating in the Phoenix group program, as it is beneficial for him, and he has come to value relationships he has established with other group members.

15. As noted above, Petitioner began receiving psychotherapy in compliance with the Board's requirements and Dr. Lavid's advice. The psychotherapy provided by Dr. Orenstein appears to have focused on Petitioner's history of depression, which Dr. Lavid had discussed in his report. While Dr. Lavid did not directly tie the depression diagnosis to Petitioner's alcohol abuse, it is fairly inferred that a physician suffering from depression is more likely to drink. Petitioner underwent psychotherapy with Dr. Orenstein, first monthly, then on a quarterly basis. During the pandemic, telehealth was utilized. In all of Dr. Orenstein's reports to the Board, he found that Petitioner did not pose a threat to the public or to patients, and that he was safe to practice.

16. (A) On November 30, 2020, Dr. Orenstein wrote Petitioner's probation monitor, Sandra Borja, reporting on Petitioner's status and progress. He reported that he had seen Petitioner on that day, and that Petitioner was meeting with his alcohol support group, which Dr. Orenstein believed to be beneficial.

(B) Dr. Orenstein stated that Petitioner's depressive symptoms were in full remission, and that Petitioner did not use anti-depressant medications any longer. Dr. Orenstein stated that further psychotherapy was not needed at that time.

17. On March 5, 2021, the Board terminated Petitioner's obligation to undergo psychotherapy, deeming the requirement completed. The Board did reserve, during the pendency of probation, to again require psychotherapy if it was deemed necessary.

COMPLIANCE WITH THE BOARD'S PROBATION ORDER

19. Petitioner has been compliant with the probation order, with one minor exception, noted below. Importantly, there is no evidence that he has missed any fluid testing, and he has not had any "dirty" tests. As found above, he complied with his obligation to have a physical and psychiatric exam, and he underwent psychotherapy as ordered. Petitioner has participated in the Phoenix support group, as ordered. Petitioner completed his ethics course in November 2020. He has a practice monitor who is more than satisfied with Petitioner's work. He is current on his probation costs (the next installment being due in 2022), and he has filed his quarterly reports.

19. Petitioner's psychologist, Dr. Orenstein, was once late on his report, for the second quarter of 2020. When brought to Petitioner's attention, he promptly rectified the situation, as Dr. Orenstein submitted the report soon after the matter was brought to Petitioner's attention.

20. (A) On January 29, 2021, Petitioner received a citation from the Board, number 800-2017-039055, for failing to maintain adequate records. The citation order required Petitioner to promptly enroll in, and to complete, a medical record keeping course approved by the Board, and he was fined \$350.

(B) Petitioner credibly testified that the matter arose from patient care that occurred in 2014. From that point of view, Petitioner did not transgress during the period of probation.

(C) Petitioner paid the fine and enrolled in a medical record keeping course. He completed the record keeping course on February 21, 2021.

OTHER EVIDENCE OF REHABILITATION

21. (A) Two physicians wrote letters of support for Petitioner, which letters were submitted with the Petition. Each letter was signed under penalty of perjury. The first letter was written by Ronald K. Moy, M.D., an emergency physician, in practice in California since 2007.

(B) In his undated letter, Dr. Moy described how he learned of Petitioner and Petitioner's professional skills three years before he even met Petitioner. Dr. Moy had worked at a small hospital, essentially taking Petitioner's place on that staff, as Petitioner had moved on. Nurses in the emergency room told Dr. Moy he had big shoes to fill, as they spoke glowingly of Petitioner as a physician and as a person.

(C) Dr. Moy met Petitioner in 2010, when Dr. Moy joined the staff at Parkview. He has worked with Petitioner ever since. He finds Petitioner to be calm, confident, and an excellent physician to work with. When he learned of Petitioner's problems, he found it hard to believe, as Petitioner had always been responsible and reliable. In any event, Dr. Moy finds that Petitioner has taken his problem as an opportunity to improve himself and has done so. He noted that Petitioner has not bemoaned his circumstances.

22. (A) Chad Clark, M.D., M.S., FACEP, FABEM, wrote his letter of support on September 12, 2019. He was at that time (and apparently still is) Department Chair and Medical Director of the Emergency Department at Parkview. At the time of his letter, he had 18 years' experience in managing emergency departments, and had hired over 65 emergency room doctors. Dr. Clark served as Petitioner's practice monitor.

(B) Dr. Clark recounted that he hired Petitioner in 2007, but the latter left in 2008 to work in Orange County. When, in early 2017, Petitioner moved back near Riverside, Dr. Clark recruited Petitioner to come back to Parkview.

(C) Dr. Clark has never heard a complaint by staff about Petitioner and described Petitioner as an asset to his medical group, Riverside Emergency Physicians. He described Petitioner's DUI as "very baffling" as he had never seen any behavior in Petitioner hinting at a problem. (Ex. A, p. 011.) Petitioner did not exhibit the unreliability often seen in persons suffering from some sort of addiction. Indeed, he stated Petitioner is always early for his shifts.

(D) Dr. Clark related that Petitioner has been open with him about his crime and the circumstances. He has never heard Petitioner blame anyone else for his problems, instead admitting that he can't drink alcohol. He believes Petitioner to be sober since the day of the accident. Dr. Clark closed his note with the statement that he wished he had more physicians in his group like Petitioner.

Petitioner's Testimony

23. Petitioner testified about his 2013 accident, describing it as a near death experience that was very tough on him and even tougher on his family. It has had a deterrent effect on him, providing a reason not to drink.

24. (A) Petitioner explained the circumstances of his conflicting statements about the circumstances leading up to the accident. When interviewed by police at the hospital, he told them that he had been coming home from work, and that he had consumed alcohol between the time he left work and the time he crashed. He testified to such at his DUI trial. The truth was that he had left his house to pick up a cake for his child's birthday, and had consumed whiskey before leaving. He told the Board's

investigator the latter version of events, and in any event admitted to drinking before the accident.

(B) When questioned by counsel for the People, Petitioner pointed out that he had suffered a severe concussion in the crash, and told the police what he thought happened. After his trial, however, he contacted a former co-worker at the hospital where he had been working at the time of the accident, and that person was able to search records, and confirm that Petitioner had not worked on the day of the accident. Thus, Petitioner believes that his injuries led him to incorrectly recall what had happened, and he has since provided accurate information to the Board.

25. Petitioner explained that probation has caused him to lose opportunities for advancement, and that he is fortunate that Parkview can give him work where he does not have to supervise physician's assistants. He cannot teach, which he would like to do, and he cannot take directorships.

26. Petitioner understands why the Board would be concerned about future problems, but he pointed out that he has had no relapses in more than eight years since the accident, and that the probation requirements of treatment and support group participation have given him the tools he needs to manage his alcoholism.

27. Petitioner spends his spare time with his family, and on positive activities such as coaching youth soccer. He has endeavored to strengthen his 15-year marriage, something that Dr. Clark confirmed in his letter.

28. Petitioner was credible in his demeanor while testifying, answering questions without hint of prevarication. Petitioner was respectful of the Board's role in public protection, and of the hearing process.

LEGAL CONCLUSIONS

1. The Board has jurisdiction to receive the petition for termination of probation and to proceed thereon pursuant to Business and Professions Code section 2307, based on Factual Findings 1 through 4.

2. Petitioner bears the burden of proving that he is entitled to the relief sought. (*Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308, 315.)

3. The purpose of license discipline is not to punish an errant practitioner, but to protect the public. (E.g., *Camacho v. Youde* (1979) 95 Cal.App.161, 164.)

4. Business and Professions Code section 2307, subdivision (e), allows an examination of a broad range of factors when considering a request to modify or terminate license probation. Such factors include the nature of the conduct leading to discipline, activities since probation was imposed, Petitioner's activities during the time the certificate was in good standing, and Petitioner's rehabilitative efforts, general reputation for truth, and professional ability. Examination of these matters weighs in Petitioner's favor.

5. The nature of Petitioner's misconduct was that he drank to the point he was a danger to himself and others; luckily he did not hurt anyone other than himself. It appears from the letters from Dr. Moy and Dr. Clark that Petitioner's activities during the period when his Certificate was in good standing were professional and positive, with exception of the 2014 record-keeping violation. Petitioner's activities since probation was imposed have been positive and professional, and his efforts at rehabilitation are commendable. He has taken steps to better himself by getting his alcoholism under control. That Petitioner has not missed a drug test, or failed one in

over four years of probation is strong evidence of sobriety. He is practicing good medicine and given what his colleagues had to say in their letters, he has a fine reputation, and is very skilled.

6. Petitioner has been sober for over eight and one-half years. He demonstrates competency in his practice. Based on all the foregoing, it is clear that the public no longer must be protected from him by a probation order. His probation should be terminated and his Certificate restored pursuant to probation term 19. He must, however, pay the balance of his probation costs.

ORDER

The Petition for Penalty Relief of Marcos Palafox is granted. The probation of his Physician's and Surgeon's Certificate, number A 80142, is hereby terminated, and said Certificate is fully restored.

Petitioner shall pay the balance of his probation costs to the Board within 60 days of the effective date of this order.

DATE: 08/30/2021

Joseph Montoya

JOSEPH D. MONTOYA

Administrative Law Judge

Office of Administrative Hearings